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In re Application of:
Finlay, et al.
Filed: 10 November, 1998
Application No. 09/189,415
Attorney Docket No. 07422/013001

OFFICE OF PETITIONS
A/C PATENTS
ON PETITION

This is a decision on the petition filed herein on 13 July, 2001, under ¶ "b" of 37 C.F.R. §1.137¹ to revive the above-identified application.

The petition is **GRANTED**.

Note: There is no evidence in the record that petitioner was in a position to have firsthand or direct knowledge that the delay in filing a timely reply was unintentional. Further, the statement of unintentional delay does not comply with the provisions of 37 C.F.R. §1.137(b)(3) in effect as of December 1, 1997. Nevertheless, the statement presented will be accepted and construed as meaning that "the entire

¹ The regulations at 37 C.F.R. §1.137 provide:

§ 1.137 Revival of abandoned application, terminated reexamination proceeding, or lapsed patent.

(b) *Unintentional*. If the delay in reply by applicant or patent owner was unintentional, a petition may be filed pursuant to this paragraph to revive an abandoned application, a reexamination proceeding terminated under §§1.550(d) or 1.957(b) or (c), or a lapsed patent. A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;
- (2) The petition fee as set forth in §1.17(m);

(3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

- (4) Any terminal disclaimer (and fee as set forth in §1.20(d)) required pursuant to paragraph (d) of this section.

(c) *Reply*. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must include payment of the issue fee or any outstanding balance. In an application, abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

[47 Fed. Reg. 41277, Sept. 17, 1982, effective Oct. 1, 1982; para. (b) 48 Fed. Reg. 2713, Jan. 20, 1983, effective Feb. 27, 1983; paras. (a) - (c), paras. (d) & (e) added, 58 Fed. Reg. 44277, Aug. 20, 1993, effective Sept. 20, 1993; para.(c) revised, 60 Fed. Reg. 20195, Apr. 25, 1995, effective June 8, 1995; revised, 62 Fed. Reg. 53131, Oct. 10, 1997, effective Dec. 1, 1997; para.(c) revised, 65 Fed. Reg. 54604, Sept. 8, 2000, effective Sept. 8, 2000; revised, 65 Fed. Reg. 57024, Sept. 20, 2000, effective Nov. 29, 2000]

delay in filing the required reply from the due date for the reply until the filing of a grantable petition to pursuant to 37 C.F.R. §1.137(b), was unintentional." If this is an incorrect interpretation in view of the new rules, petitioner is required to provide a statement to that effect. In the event that petitioner has no knowledge that the delay was in fact unintentional, petitioner should make a reasonable inquiry to ascertain that, in fact, the delay was unintentional. If petitioner discovers that the delay was intentional, petitioner must so notify the Office.

The record indicates that:

- petitioner failed to timely respond to the Notice to Comply with Requirements for Patent Applications Containing Nucleotide Sequence and/or Amino Acid Sequence Disclosures mailed on 28 July, 2000, with a shortened statutory deadline for reply of 28 August, 2000;
- the application became abandoned at midnight on 28 August, 2000;
- a notice of abandonment was mailed on 7 March, 2001;
- a copy of the 28 July Office action was mailed to petitioner on 27 June, 2001;
- a response to the Office action was filed on 13 July, 2001.

This application will be forwarded to Technology Center 1600 for further processing.

Telephone inquiries concerning this matter may be directed to Kathy Matecki at (703) 305-1645.



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Office of the Deputy Commissioner
for Patent Examination Policy